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No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1957

RENAIRE CORPORATION (PENNSYLVANIA) ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINION BELOW

No opinion was rendered by the court of appeals. For its order, see Pet. 20-21.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1957, and the petition for a writ of certiorari was filed on July 12, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that an order of the Federal Trade Commission dismissing an administrative appeal from an interlocutory ruling of a hearing examiner was nonreviewable.

STATUTES INVOLVED

The pertinent statutory provisions are set forth at pages 4 to 5 of the petition.

STATEMENT

In May 1956, the Federal Trade Commission issued a complaint charging petitioners and others with violating Section 5 of the Federal Trade Commission Act. At the hearing, after Commission counsel had introduced his evidence in support of the complaint, petitioners moved to dismiss on the ground, *inter alia*, that they were not engaged in interstate commerce. The examiner denied the motion, without prejudice to its renewal at the time the record was closed (Pet. 25). Petitioners appealed to the Commission, which on May 15, 1957, denied the appeal on the ground that petitioners had not shown, as the Commission's Rules of Practice require as a condition to appealing from an examiner's interlocutory ruling, that the ruling "involves substantial rights and will materially affect final decision, and that a determination of the correctness of such ruling before conclusion of the trial would better serve the interests of justice" (*ibid.*).

Petitioners then filed, in the Court of Appeals for the Third Circuit, a petition for review of the Commission's order of May 15. On the Commission's motion, the court of appeals dismissed the petition "for want of jurisdiction" (Pet. 21), pointing out (Pet. 20) that review was being sought of "an interlocutory order of the Commission" which "is clearly not reviewable."

ARGUMENT

The court of appeals correctly held that the Commission's order of May 15, 1957, which sustained the examiner's refusal to dismiss the complaint after Commission counsel had put in his case-in-chief, was non-reviewable. "[A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U. S. 103, 112-113. The Commission's order of May 15 had none of these effects.

Petitioners contend (Pet. 9-14), however, that the rule against judicial review of interlocutory orders is inapplicable where the agency is acting beyond its jurisdiction; and that here the Commission, by moving in the court below to dismiss, "admitted" the allegations in the petition for review, including the allegation that petitioners are not engaged in interstate commerce (Pet. 7-8). The short answer is that the motion to dismiss "admits as facts allegations describing the manner in which the business is

carried on, but not legal conclusions from those facts," and that "[t]he allegations that interstate or foreign commerce is not involved are conclusions of law." *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 57. Furthermore, the Commission pointed out (Pet. 25), in dismissing the appeal from the examiner's ruling, that such ruling was without prejudice to petitioners' right to renew their motion to dismiss at the close of the hearing, and did not affect their right "to have all questions of law and fact subsequently passed upon by the Commission." In short, the Commission has not yet finally determined the extent of its jurisdiction over petitioners.

Since that question can be fully litigated upon review of any final order which the Commission may enter, any attempt to review the question at this stage of the litigation is wholly premature.[1] The court of appeals, therefore, correctly dismissed the petition to review. "[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51.

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[1] The fact that the Commission has put in its case-in-chief, including its evidence on interstate commerce, affords no basis for judicial review of the Commission's interlocutory order refusing to dismiss the complaint. See *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 766-767.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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